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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, et al., *Petitioners,*

v.

JOHN L. McMILLAN, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR DISTRICT OF COLUMBIA RESPONDENTS

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INDEX

	Page
Questions Presented	1
Statement	2
Summary of Argument	6
Argument:	
Petitioners' action for damages against the District of Columbia respondents was correctly held foreclosed by the doctrine of official immunity.	7
Conclusion	16

CASES CITED

Barr v. *Matteo* (1959), 360 U. S. 564	6, 8, 10, 11, 13, 14
Bershad v. *Wood* (9th Cir., 1961), 290 F. 2d 714	12
Cooper v. *O'Connor, et al.* (D. C. Cir. 1938), 99 F. 2d 135	12
Dale v. *Hahn* (2nd Cir., 1971), 440 F. 2d 633	15
David v. *Cohen* (D. C. Cir., 1969), 407 F. 2d 1268	12
Farr v. *Valentine* (1912), 38 App. D.C. 413	14
Franklin v. *Meredith* (10th Cir., 1967), 386 F. 2d 958	15
Frommhagen v. *Glazer* (9th Cir., 1971), 442 F. 2d 338	14
Gordon v. *Adcock* (9th Cir., 1971), 441 F. 2d 261	12
Gregoire v. *Biddle* (2nd Cir., 1949), 177 F. 2d 579	9
Howard v. *Lyons* (1959), 360 U. S. 593	8, 10, 11
Hughes v. *Johnson* (9th Cir., 1962), 305 F. 2d 67	12
Kirstein v. *Rector and Visitors of University of Virginia* (E. D. Va., 1970), (three-judge court) 309 F. Supp. 184	15
McLaughlin v. *Tilendis* (7th Cir., 1968), 398 F. 2d 287	15

PAGE

Newbury v. *Love* (D. C. Cir., 1957), 242 F. 2d 372 11-12

Norton v. *McShane* (5th Cir., 1964), 332 F. 2d 855 12

Papagianakis v. *The Samos* (4th Cir., 1950), 186 F.2d 257 12

Pierson v. *Ray* (1967), 386 U. S. 547 15

Sauber v. *Gliedman* (7th Cir., 1960), 283 F. 2d 941 12

Scherer v. *Brennan* (7th Cir., 1967), 379 F. 2d 609 12

Skolnick v. *Campbell* (7th Cir., 1968), 398 F. 2d 23 12

Sowders v. *Damron* (10th Cir., 1972), 457 F. 2d 1182 12

Spalding v. *Vilas* (1896), 161 U. S. 483 9

Taylor v. *Glotfelty* (6th Cir., 1952), 201 F. 2d 51 12

Watkins v. *United States* (1957), 354 U. S. 178 13

Wheeldin v. *Wheeler* (1963), 373 U. S. 647 14

UNITED STATES CODE CITED

Civil Rights Act of 1871, 42 U. S. C. § 1983 ..... 6, 7, 14, 15, 16

OTHER AUTHORITIES CITED

Annot. 26 A. L. R. 3rd 492 14

Developments in the Law—Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827 (1957) 12

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BRIEF FOR DISTRICT OF COLUMBIA RESPONDENTS

QUESTIONS PRESENTED

1. Whether the doctrine of official immunity forecloses petitioners' action for damages against the members of the District of Columbia Board of Education and the District of Columbia Superintendent of Schools based upon the failure of such government officials to promulgate regulations governing the confidentiality of school documents and memoranda.

2. Whether the doctrine of official immunity forecloses petitioners' action for damages against a junior high school principal and teacher based upon the release by such officials to a congressional committee of data which the committee, months later, authorized to be printed in a report and disseminated in the public domain.

STATEMENT

In a class action filed in the court below on January 8, 1971, petitioners, as parents of certain pupils at the Jefferson Junior High School in the District of Columbia, sought declaratory and injunctive relief and damages based upon the distribution of a public report containing certain information allegedly violative of their right of privacy. Named as federally affiliated defendants were the Chairman of the District of Columbia Committee of the United States House of Representatives (hereinafter "the Committee"), the Congressmen comprising that Committee, various committee staff members and investigators, the Superintendent of Documents and the Public Printer. The United States was additionally named as a party defendant. Named as District of Columbia affiliated defendants were the members of the Board of Education of the District of Columbia (hereinafter "the Board"), the District of Columbia Superintendent of Schools (hereinafter "the superintendent"), the principal of Jefferson Junior High School (hereinafter "the principal"), and a teacher at that school (hereinafter "the teacher") (App. 1, 4-8).

In their complaint, petitioners alleged that on or about December 16, 1970, the Committee members authorized the publication and distribution of a report entitled "Investigation and Study of the Public School System of the District of Columbia" (House Report No. 91-1681, hereinafter "the report"), and that the report contained certain allegedly derogatory information concerning numerous named students of the Jefferson Junior High School, spe-

cifically, attendance lists, disciplinary letters and memoranda, test papers, and other school documents (App. 8).

Petitioners further alleged that on April 14, 1970, the principal provided a Committee investigator with copies of the disciplinary letters printed in the report and that on May 6, 1970, the teacher provided a Committee investigator with copies of the attendance lists and test papers. Petitioners asserted that such data was in turn forwarded to the Committee and to the Public Printer for incorporation into the report and distribution in the public domain. Neither the Board members nor the superintendent, claimed petitioners, had promulgated rules or regulations governing the confidentiality of these types of school papers (App. 9).

Petitioners went on to allege that the publication of the report caused an adverse impact on their physical and mental health as well as on the health and future careers of their children (App. 10, 11).

Petitioners requested the court (1) to declare that the publication of the matters complained of violated their constitutional, statutory, and other rights, and (2) to enjoin future publication and dissemination of the report as well as disclosure or publication of any attendance records, disciplinary reports, letters, and examination papers mentioning petitioners and their children by name (App. 11, 12). Petitioners further requested the court to compel the Board members to establish rules and regulations regarding the confidentiality of school papers and the right to privacy of students in the schools of the District of Columbia, and to prohibit, *pendente lite*, the members of the Board, the superintendent, the principal and the teacher from disclosing any further information which identifies by name any student of the Jefferson Junior High School and any other students of the District of Columbia public schools. Finally, petitioners requested the court to award them compensatory and punitive damages (App. 12).

Petitioners filed, contemporaneously with their complaint, motions for a temporary restraining order and a preliminary injunction (App. 16-19). Because respondents were not served with process, they filed no answer to the complaint and no oppositions to the motions of petitioners.

On the same day the complaint and petitioners' motions were filed, the case came on before the district court. Counsel for the District of Columbia respondents introduced into evidence a proposed policy statement of the Board respecting the treatment of future congressional inquiries (App. 33, 34, 42, 43). That statement was drafted within the week following publication of the report and recited that:

> "1. The names, addresses and other identifying information related to students are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take all necessary steps to insure that the confidentiality of such privileged information is protected when its release may be demeaning or discrediting to a student or group of students.
>
> "2. The names, addresses and other identifying information related to teachers or any other school personnel are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take every necessary step to protect the confidentiality of such information when there is any reason to believe that its release may be injurious to any individual or group.
>
> "3. The Board of Education and the Superintendent or his designee shall be the only persons authorized to transmit information officially requested by the Congress pertaining to the conduct of school affairs.

"4. The Board of Education and the Superintendent or his designee are the only persons authorized to provide official interpretations of Board of Education policy with regard to the release of information to the Congress." (App. 42-43.)[1]

In the course of the proceedings, the court read into evidence the resolution defining the Committee's investigative powers in connection with the affairs of the District of Columbia Government (App. 36, 37). Counsel for petitioners hastened to state that he did not claim that the Committee acted pursuant to an invalid legislative purpose in investigating the District of Columbia public school system, specifically noting that he did not challenge the actions of investigators in seeking information from the principal and the teacher (App. 35-37). In this regard, counsel for petitioners represented to the court that:

"* * * They may investigate, they may go into the schools and talk to people, perfectly legitimate. We don't question it; it would be fruitless and facetious of us to do that. However, once they have done that we submit they just simply cannot reproduce deflamatory [sic], inflamatory, confidential materials. Letters for instance, from a principal to a parent, saying Mrs. Smith, your daughter today broke a window. No one has adjudicated whether it is true or not. It doesn't really matter whether it is true or not, it is just simply a private matter.

* * * *

"* * * That resolution indicates the Committee can investigate, can subpoena documents, it can

[1] A similar policy statement judicially noticed by the court of appeals was adopted by the Board on February 17, 1971 (App. 87, 93-94).

compel witnesses, it can go around to the schools as it did. We have no quibble with that * * * ." (App. 36-37.)

At the conclusion of the hearing, the district court denied petitioners' motion for a temporary restraining order and dismissed the complaint (App. 40-41), and on January 11, 1971, the court filed a written opinion in support of its ruling (App. 48-50).

On March 11, 1971, the court of appeals affirmed the district court's ruling, and on March 18, 1972, petitioners filed in this Court a petition for a writ of certiorari. The Court granted certiorari on June 26, 1972.

SUMMARY OF ARGUMENT

The liability of the District of Columbia respondents is foreclosed by the doctrine of official immunity under this Court's holdings in *Barr* v. *Matteo*, 360 U. S. 564 (1959), and related decisions. In seeking to compel the members of the Board and the superintendent to respond in damages because of their failure to promulgate regulations governing the confidentiality of documents, petitioners challenge top level discretionary action which has always been protected by that doctrine.

The actions of the principal and teacher in releasing data to the Committee are similarly protected by the official immunity doctrine, since under *Barr* v. *Matteo* that doctrine does not cease to be applicable simply because public officers perform at an intermediate level rather than at a policy-making level. In determining what data to release intergovernmentally to the Committee these officers were clearly performing a discretionary function within the outer perimeter of their official duties and were accordingly immune from liability.

That immunity is not altered by the Civil Rights Act of 1871, because in providing information to the congressional

investigators in furtherance of the Committee's duly authorized investigative purpose, and the constitutional authority of Congress to legislate for the District of Columbia, the principal and teacher acted under color of federal law rather than under color of state law. In any event, it is axiomatic that public officers do not lose their immunity, even in cases arising under the Civil Rights Act of 1871, when they act in good faith, and it is clear from the record that both the principal and the teacher acted in good faith in furnishing the Committee with the requested data.

ARGUMENT

Petitioners' action for damages against the District of Columbia respondents was correctly held foreclosed by the doctrine of official immunity.

In essence, petitioners claim that the Board members and the superintendent may be compelled to respond in damages because of their past failure, in the exercise of their top level supervisory discretion, to promulgate regulations governing the confidentiality of school documents and memoranda.[2] Petitioners also claim that since the principal and the teacher engaged in the actual release to congressional investigators of the information subsequently printed in the report, they too are amenable to liability. The court of appeals concluded that petitioners' claims against all District of Columbia respondents were foreclosed by the doctrine of official immunity, as that doctrine has been recognized and applied by this Court (App. 86-91). In chal-

[2] In effect, the Board did just that in a revised "Policy Statement Regarding Confidential Inquiries" adopted on February 17, 1971 (App. 93-94). In light of this intervening development the court of appeals ruled, consistent with principles articulated by this Court, that there was "no substantial threat of continuing injury," and hence no basis for the issuance of an injunction against the District of Columbia respondents (App. 87). Petitioners did not challenge the injunctive relief aspect of the Court's ruling in their certiorari petition and manifestly should not be permitted to do so now.

lenging that ruling, petitioners make no attempt to elaborate on the manner in which this Court has previously interpreted and applied the official immunity doctrine, but place great emphasis on a series of decisions of the United States Court of Appeals for the District of Columbia Circuit (Brief at 54). These decisions, however, were not generally concerned with the official immunity doctrine, but dealt with the question of the application of the doctrine of *sovereign immunity* to the District of Columbia as a governmental entity, in the absence of a showing of a top level discretionary judgment involving the formulation of policy. Nonetheless, petitioners urge on the basis of such decisions that the doctrine of official immunity may be invoked only if it can be demonstrated in each case that in the absence of its invocation "the quality and efficiency of government itself" will be jeopardized (Brief at 56). It is the position of the District of Columbia respondents that petitioners have misconceived the nature of the official immunity doctrine and that the court of appeals acted in conformity with principles articulated by this Court in applying that doctrine in the instant case.

In *Barr* v. *Matteo,* 360 U. S. 564 (1959), this Court declared the policy underlying the official immunity doctrine as one designed to encourage government officers to perform their duties vigorously and free from intimidation by the threat of damage suits. That case involved an action for libel based upon a press release issued by the Acting Director of the Office of Rent Stabilization. *Howard* v. *Lyons,* 360 U. S. 593 (1959), a companion case, involved a suit for defamation predicated on a statement issued by the Commander of the Boston Naval Shipyard. The Court held that both the Government employees were absolutely privileged against liability for damages, because the actions complained of had been performed within the scope of their official duties. The Court noted that as long as the action taken by the officer involved "was within the outer perim-

eter of * * * [his] line of duty" the immunity privilege must be recognized. That privilege, the Court added, was applicable despite allegations of malice. 360 U. S. at 575.

In reviewing the history of the federal law of privilege as a defense by Government officers "to civil damage suits for defamation and kindred torts" (360 U. S. at 569), the Court pointed out that, while Congress (by constitutional provision) and judicial officers (by court decision) early had an absolute privilege in the exercise of their official functions, the privilege had also been applied in *Spalding* v. *Vilas,* 161 U. S. 483 (1896), to protect officials in the executive branch. Concluding that the balance between the public and private interests involved should be struck in favor of the former, the Court described the basic justification for the grant of immunity as follows (360 U. S. at 571):

> "* * * It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. * * *"

The Court quoted extensively from Judge Learned Hand's opinion in *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2nd Cir., 1949), which, it noted, had admirably expressed the reasons underlying the privilege:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good,

should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *"

The Board members and the superintendent, much like the officials involved in *Barr* and *Howard*, are upper echelon employees entrusted with policy making functions. The principles articulated by this Court in those cases unquestionably compel the conclusion that neither the Board members nor the superintendent may be compelled to respond in damages for failing to promulgate regulations in the exercise of such top level functions.

A like privilege was properly granted to both the principal and the teacher. The rationale of *Barr* and *Howard* by no means ceases to be applicable simply because the employees involved perform at an intermediate level rather than a policy making level. In concluding that the privilege protects lesser government employees the Court in *Barr* went on to emphasize (360 U. S. at 572-574) that:

> "* * * The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.
>
> "* * * It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule * * * ."

As the Court recognized, since the privilege is "an expression of a policy designed to aid in the effective functioning of government," the only difference in its application to actions of high ranking executive officers and to those of an officer of lower rank lies in the broader range of the functions and responsibilities and the wider scope for the exercise of discretion in the case of the former.

The lower federal courts—both before and since *Barr*—have consistently held the privilege applicable to lower ranking government employees. See e.g., *Newbury* v. *Love,*

242 F. 2d 372 (D. C. Cir., 1957) (suit for defamation against a Government personnel officer); *Papagianakis* v. *The Samos,* 186 F. 2d 257 (4th Cir., 1950) (suit against immigration officials seeking damages on the ground of false imprisonment); *Sauber* v. *Gliedman,* 283 F. 2d 941 (7th Cir., 1960) (action for malicious defamation against a Special Assistant to the Attorney General); *Cooper* v. *O'Connor, et al.,* 99 F. 2d 135 (D. C. Cir., 1938) (Comptroller of Currency and deputies, receiver of bank, attorney for government, special agent of F. B. I., sued for malicious prosecution); *Bershad* v. *Wood,* 290 F. 2d 714 (9th Cir., 1961), *David* v. *Cohen,* 407 F. 2d 1268 (D. C. Cir., 1969), and *Sowders* v. *Damron,* 457 F. 2d 1182 (10th Cir., 1972) (actions for damages against Internal Revenue officers); *Hughes* v. *Johnson,* 305 F. 2d 67 (9th Cir., 1962) (suit for trespass against federal game wardens); *Taylor* v. *Glotfelty,* 201 F. 2d 51 (6th Cir., 1952) (libel action based on report of federally employed psychiatrist); *Scherer* v. *Brennan,* 379 F. 2d 609 (7th Cir., 1967) (treasury agents assigned to protect the President sued for trespass and unlawful interference with plaintiff's right of access to his place of business); *Skolnick* v. *Campbell,* 398 F. 2d 23 (7th Cir., 1968) (action for assault and battery against court crier and bailiff); *Gordon* v. *Adcock,* 441 F. 2d 261 (9th Cir., 1971) (action for libel based on evaluation report submitted to Civil Service Commission by former superior officer of applicant for federal employment). See also *Norton* v. *McShane,* 332 F. 2d 855, 859-860, n. 5 (5th Cir., 1964); *Developments in the Law—Remedies Against the United States and its Officials,* 70 Harv. L. Rev. 827, 835 (1957).

The actions of the principal and the teacher plainly fell within the outer perimeter of their official duties. These officers were dealing with information garnered by them in the course of such duties when called upon to decide whether to cooperate in connection with the investigation of a con-

gressional committee. In the district court petitioners did not claim that the Committee lacked authority to request information from these officials, or that such officials were unjustified in providing data of the kind requested to investigators acting pursuant to congressional resolution (App. 35-37). Indeed, as the Court pointed out in *Watkins* v. *United States,* 354 U. S. 178, 187 (1957), "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. * * * "

In addition, the actions of the principal and the teacher were plainly discretionary actions. Petitioners do not dispute the notion that, as officers affiliated with the District of Columbia public school system, it was the obligation of the principal and the teacher to use judgment in determining the extent to which they would cooperate with the Committee's investigators and what information they would provide. The policy declared by this Court in *Barr* v. *Matteo* —one designed to encourage government officers to perform their duties vigorously and free from intimidation by the threat of damage suits—fully justified the ruling of the court of appeals that they were immune from liability based upon the discharge of that obligation.

It warrants emphasis that, unlike in *Barr* v. *Matteo,* the data with which this case is concerned was not publicly disseminated by the principal and the teacher. Nor was it released by these officials in anticipation of its public dissemination months later. Quite to the contrary, counsel for petitioners in effect conceded in the district court that the principal and the teacher acted in good faith in releasing such data to congressional investigators (App. 35-37). To be sure, cooperation with duly authorized Committee investigations cannot be equated with ultimate conspiratorial participation in the actions of the Public Printer. From the standpoint of the District of Columbia respondents, therefore, this case involves information provided in good faith

by subordinate government officials to duly authorized representatives of a Committee of the Congress of the United States in furtherance of the concededly valid purpose set forth in the resolution by which the Committee was organized (App. 36-37). As such it involves nothing more than the circulation of an internal report within the confines of the government itself. Internal disseminations of this kind have traditionally enjoyed the protection of absolute privilege. See *Barr* v. *Matteo,* dissenting opinion of Chief Justice Warren, 360 U. S. at 582, citing *Farr* v. *Valentine,* 38 App. D. C. 413 (1912). See also *Frommhagen* v. *Glazer,* 442 F. 2d 338, 340 (9th Cir., 1971); Annot. 26 A. L. R. 3rd 492, 510-515. In short, the *Barr* rationale has *a fortiori* applicability to the actions of the District of Columbia respondents in the case at hand.

Conformably with the views expressed by the dissenting judge in the court of appeals (App. 112), petitioners, however, urge that the common law immunity of the District of Columbia respondents has been narrowed by the Civil Rights Act of 1871, 42 U. S. C. § 1983. While that enactment is concerned with actions taken under color of state law, it does not reach actions taken under color of federal law. See *Wheeldin* v. *Wheeler,* 373 U. S. 647, 650 (1963). The congressional investigators who obtained the information from the principal and teacher are unquestionably entitled to the protection of common law official immunity unmodified by the Civil Rights Act of 1871, since they clearly were acting under color of federal law in furtherance of the policy set forth in the Committee's resolution (App. 36-37). That being so, it would be both inconsistent and inequitable to apply one immunity standard to the investigators as the receivers of the information, yet a different and narrower standard to the principal and teacher as the providers of the information. The more logical conclusion, we submit, is that the provision and receipt of the information constituted interrelated actions in furtherance

of the Committee's duly authorized investigative purpose (App. 36-37) and the constitutional authority of Congress to legislate for the District of Columbia, and thus clearly are not actions taken under color of *state* law within the purview of 42 U. S. C. § 1983.

Even if it be assumed that § 1983 is applicable to the District of Columbia respondents, it by no means follows under the circumstances of this case that § 1983 should restrict their immunity. As this Court made plain in *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), "the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities" when it enacted § 1983. It is true, of course, that federal courts, while recognizing the limits of official immunity in the context of the Civil Rights Act as far from certain, have given that doctrine a more restrictive application in federal civil rights cases involving defendants other than legislative and judicial officers. See, for example, *Dale* v. *Hahn*, 440 F. 2d 633, 636-637 (2nd Cir., 1971). However, these courts, consistent with pronouncements of this Court in *Pierson* (id. at 555-557), have not hesitated to permit invocation of the official immunity doctrine in actions arising under § 1983, when it was clear from the record that the officers involved acted in good faith. See *Franklin* v. *Meredith*, 386 F. 2d 958, 960-961 (10th Cir., 1967); *McLaughlin* v. *Tilendis*, 398 F. 2d 287, 290 (7th Cir., 1968); *Kirstein* v. *Rector and Visitors of University of Virginia*, 309 F. Supp. 184, 189 (E. D. Va., 1970) (three-judge court).

As previously pointed out, counsel for petitioners made plain in the district court that he had "no quibble" concerning the good faith of the principal and the teacher in providing information to the Committee, but complained essentially of the ultimate publication and dissemination of that information months later (App. 36-37, 44, cf. App. 9). Because the District of Columbia respondents admittedly were not privy to such publication and dissemination,

that activity had no bearing on their good faith. Accordingly, their immunity remained intact notwithstanding the Civil Rights Act of 1871.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court of appeals as to the District of Columbia respondents should be affirmed.

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